Supreme Court, U.S.
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No. 09-451

IN THE

Supreme Court of the United States

TRAVIS SAULSBERRY and LORETTA JAMES,
in their individual and official capacities,

Petitioners,

v.

LORRI MYERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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I. PETITIONERS' REPLY TO RESPONDENT'S FACTUAL STATEMENTS

In her Statement regarding the facts, Respondent includes an allegation which the district court previously rejected. Respondent states that Petitioner James had Respondent shower and change within the view of a male inmate. (Response to Petition for Writ of Certiorari at 2). However, the district court expressly determined the evidence did not support Plaintiff's claim that another inmate viewed her while she showered and granted summary judgment to Defendants/Appellees on this issue. (Petition for Writ of Certiorari, Appx. A at 14a).

II. PETITIONERS' REPLY TO RESPONDENT'S ARGUMENT

The basis for Petitioners' request for this Court's review is that the law is far from clearly established that individualized suspicion is required prior to strip searches of pretrial detainees. As a result of the unsettled status of the law, Petitioners were entitled to qualified immunity. An official is entitled to qualified immunity where clearly established law does not show that his actions violated constitutional rights. *Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009).

Respondent's argument that the Tenth Circuit's opinion was correct merely because numerous lower federal courts have required individualized suspicion prior to the strip search of an arrestee is not responsive to Petitioners' arguments in their Petition for Writ of Certiorari. In fact, the lower courts which required

individualized suspicion prior to a strip search contradicted this Court's decision in *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). *Bell* was issued in 1979 and has not been rejected by this Court; therefore, it remains the law. *See Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008) ("[u]ntil the Supreme Court tells [courts] that the *Bell* approach no longer applies where that Court applied it, [courts] are inclined to continue using it.").

A. The fact that lower court decisions have contradicted this Court's opinion in *Bell* reflects that the strip search law is not clearly established.

As this Court recently decided in a case involving the strip search of a school student, the divergence of lower courts from a decision of this Court ***in and of itself*** established that the law relevant to that case was not clearly established and warranted the application of qualified immunity. *See Safford Unified School Dist. No. 1 v. Redding*, ___ U.S. ___, 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009). In *Safford*, this Court stated,

> [w]e think these differences of opinion [of lower federal courts] from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we

> have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.

Safford Unified School Dist. No. 1, 129 S.Ct. at 2644.

In this case, as in the *Safford* case, the existence of numerous lower court decisions diverging from this Court's precedent in *Bell* **alone** demonstrates that the law regarding strip searches of arrestees was not clearly established. Further, the fact that other lower courts have recognized that divergence and have attempted to realign their decisions with this Court's holding in *Bell* further reflects that the law is unclear.

B. The lower court decisions Petitioner relies upon did not clearly establish the law regarding strip searches and, in fact, clouded the law.

Respondent asserts that the existence of circuit and federal district court decisions requiring individualized suspicion prior to the strip search of an arrestee ends the discussion on the issue. She also points to decisions which considered the inmate's placement in the jail or the severity of his crime. However, Respondent's focus on the lower court decisions which have contradicted *Bell* only serves to reinforce Petitioners' argument that the status of the law surrounding the strip search standard is unclear.

Under *Bell*, this Court did not require probable cause and did not expressly require reasonable suspicion prior to a strip search. *Bell*, 441 U.S. at 558-59. ***All*** detainees were strip searched. *Id.* Likewise, Respondent's argument that lower courts have considered whether the arrestee was placed in general population when evaluating the propriety of strip searches is not relevant to Petitioners' reasons for requesting this Court's review of this matter. In *Bell*, this Court did not evaluate the degree of security required for different locations in the jail but placed great emphasis on the fact that jails, in general, are "fraught with serious security dangers" and that smuggling of dangerous items or substances into the jail was a significant, serious concern. *Bell*, 441 U.S. at 559-60. Similarly, Respondent's attempt to distinguish this case from other cases based on the severity of the arrestee's criminal charge also fails. In *Bell*, some inmates housed in the detention facility were charged with absolutely no wrongdoing and were merely being held as witnesses in protective custody. *Bell*, 441 U.S. at 524. Even those inmates were subjected to the invasive body cavity searches based on the overwhelmingly important security concerns in a jail. *Bell*, 441 U.S. at 558. Thus, Respondent's recitation of decisions in which lower courts have issued opinions basing their decisions on whether individualized suspicion existed, the severity of the arrestee's charge, and whether the inmate was housed in general

population[1] fails to support her argument that the law is settled.

Furthermore, as Petitioners established in their Petition, other lower courts have issued decisions rejecting or questioning the reasoning in the decisions Respondent has cited. As Petitioners stated, the Eleventh Circuit examined the principles set out in *Bell* and upheld a policy of the Fulton County Jail requiring every person booked into the jail's general population to undergo a visual strip search, conducted without individualized suspicion to justify the search and regardless of the crime with which the person was charged. *Powell v. Barrett*, 541 F.3d 1298, 1300 (11th Cir.

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1. In addition, many of the cases Respondent cites involved strip searches which were much more invasive than the visual search at issue in this case. *See, e.g., Miller v. Kennebec County*, 219 F.3d 8 (1st Cir. 2000) (inmate was subjected to strip search, including "squat and cough" search while naked); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981) (strip search allegedly was conducted in an area exposed to public view); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989) (plaintiff allegedly was required to drop her underpants, then bend over and expose her rectum); *Cottrell v. Kaysville City, Utah*, 994 F.2d 730 (10th Cir. 1993) (arrestee was required to remove all her clothes, then bend over while deputies inspected her); *Helton v. U.S.*, 191 F.Supp.2d 179 (D.D.C. 2002) (inmates allegedly subjected to a "strip and squat" search); *Weber v. Dell*, 804 F.2d 796 (2d Cir.1986) (arrestee was subjected to a strip body cavity search); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir.1983) (search included visual inspection of body cavities); *Jones v. Edwards*, 770 F.2d 739 (8th Cir.1985) (same). While *Bell* upheld visual body cavity searches, the visual search during a clothing exchange which occurred in this case was much less invasive.

2008).[2] The *Powell* court further determined that, following the *Bell* opinion, the courts which had required reasonable suspicion prior to a strip search of a pretrial detainee had simply misapplied *Bell*. *Powell* at 1306-07. The Seventh Circuit found that a strip search of a jail detainee was constitutional even though she was never placed in general population. *See Stanley v. Henson*, 337 F.3d 961, 962, 966-67 (7th Cir. 2003) (upholding as constitutional a clothing-exchange procedure that required inmates to disrobe in front of same-sex officers and put on jail-issued uniforms). Courts in two circuits have determined it prudent to re-examine the decisions regarding strip searches of detainees in light of this Court's longstanding precedent. *See Florence v. Board of Chosen Freeholders of County of Burlington*, 657 F.Supp.2d 504 (D.N.J. 2009) (granting the motion certifying the order for interlocutory appeal to the Third Circuit based on the decisive split regarding the proper application of this Court's opinion in *Bell*); *Bull v. City & County of San Francisco*, 558 F.3d 887 (9th Cir. 2009) (granting an en banc rehearing of *Bull v. City & County of San Francisco*, 539 F.3d 1193 (9th Cir. 2008), which found a policy of conducting blanket strip searches of detainees regardless of the severity of the charge and without reasonable suspicion to be unconstitutional).

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2. Petitioners do not, as Respondent implies, rely only upon *Powell* to establish that the law was not clearly established regarding the standard required for a visual search. Petitioners cited and examined the *Powell* opinion because of its thorough explanation of various circuits' departure from this Court's precedent in *Bell* over the last two to three decades. Thus, contrary to Respondent's argument, the publication date of *Powell* is not relevant.

Thus, Respondent's reliance on the opinions of lower courts which strayed from this Court's decision in *Bell* is misplaced and ignores the fact that this Court's decisions are binding on all circuits. *See Powell*, 541 F.3d at 1302 ("[u]ntil the Supreme Court tells [courts] that the *Bell* approach no longer applies where that Court applied it, [courts] are inclined to continue using it.").

Any decisions which contradicted *Bell*, such as the decisions Respondent cites, served only to muddy the issue. *See Serna v. Goodno*, 567 F.3d 944, 950-51 (8th Cir. 1009) (*Powell* "at a minimum" highlights the fact that whether the law requires reasonable suspicion for strip searches of detainees is unclear). Furthermore, the *Powell* and *Stanley* decisions, as well as the decisions in *Florence* and *Bull* to re-examine earlier strip search opinions in light of this Court's precedent, further support Petitioners' assertion that the law regarding the requirements for strip searches is not clearly established.

C. Because Petitioners did not violate clearly established law, they were entitled to qualified immunity.

As Petitioners have demonstrated, the law applicable to this case was far from "clearly established." Furthermore, Petitioners' actions fully complied with this Court's precedent in *Bell*. Therefore, Petitioners were entitled to qualified immunity.

As this Court concluded in *Bell*, no constitutional violation occurred in that case, because the "significant and legitimate security interests" justifying the very invasive body cavity searches outweighed the privacy interests of the inmates. *Bell*, 441 U.S. at 559-60. Here,

Respondent did not allege that a search of her body cavities such as the very invasive search that was upheld as constitutional in *Bell* occurred. She alleged only that she was required to disrobe and shower and that a "visual" search of her person – not an invasive body cavity search as occurred in *Bell* – was performed. If the much more invasive searches in *Bell* were justified under the Fourth Amendment based on safety and security concerns, the search Respondent alleges occurred clearly was justified based on those same concerns. Because Petitioners demonstrated the law regarding this type of search was far from clearly established and further demonstrated that Petitioners' actions did not violate clearly established law, both Saulsberry[3] and James were entitled to qualified immunity.

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3. Respondent did not and cannot demonstrate Saulsberry's direct participation in the relevant events. Even if Respondent had demonstrated Saulsberry's involvement based on a failure to train jailer James regarding strip searches or based on the search policy, he still would be entitled to qualified immunity based on the fact that the policy complied with this Court's precedent and was constitutional. Therefore, Respondent cannot demonstrate that Saulsberry violated clearly established law based on his participation or on his purported involvement based on policy or training. *See Pearson*, 129 S.Ct. at 815 (officials who do not violate clearly established law are entitled to qualified immunity).

III. CONCLUSION

The Tenth Circuit erred in determining that Petitioners were not entitled to qualified immunity regarding the strip search of Respondent, and the petition for a writ of certiorari should be granted.

Respectfully submitted,

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